IN THE SUPREME COURT

OF THE STATE OF MONTANA

Supreme Court No. DA 10-0063

DANIEL and ELAINE BADLEY,

Plaintiffs and Appellees,

v.

CLINTON JOHN MORRIS,

Defendant and Appellant,

BRIEF OF APPELLEES DANIEL and ELAINE BADLEY

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County Cause No. DV-06-290(C), Honorable Stewart E. Stadler

---

Sean S. Frampton
Brian M. Joos
Morrison & Frampton, PLLP
341 Central Avenue
Whitefish, MT 59937
Telephone: (406) 862-9600
Facsimile: (406) 862-9611

Attorneys for Appellant

Anne G. Biby
Hash, O'Brien, Biby & Murray PLLP
136 First Avenue West
P. O. Box 1178
Kalispell, MT 59903-1178
Telephone: (406) 755-6919
Facsimile: (406) 755-6911

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Did the District Court err in granting summary judgment to Appellees Daniel and Elaine Badley, and ruling that Appellant John Morris did not have a prescriptive easement across any part of the Badleys' property?

As a correction to Appellant John Morris' Issue Number 1, the District Court did *not* find that Morris' use of the roadway in question was permissive; it found that his use was "hostile," but that it did not continue for the requisite five years.

As a correction to Appellant John Morris' Issue Number 3, the evidence is not "undisputed" that Morris' wife, Kelsey Morris, used the roadway "in a manner that exceeded the alleged permission."

STATEMENT OF THE CASE

John Morris appeals from an order granting summary judgment to plaintiffs Daniel and Elaine Badley, finding that Morris had not established a prescriptive easement across the Badleys' property. (Order, Doc. 77.) The Badleys had sued Morris, alleging trespass and private nuisance, and asking the court to enjoin him from driving on their property and from tearing out their efforts to construct a fence on the boundary line. (Complaint and Amended Complaint, Docs. 1 and 33.)

Morris moved for partial summary judgment below, contending that he had established a prescriptive easement as a matter of law. (Docs. 38, 39.) The Badleys then filed a cross-motion for partial summary judgment on the same issue.

(Doc. 46.) Prior to ruling, the lower court required the parties to submit a detailed survey of the roadway in question. (Docs. 66, 71.) It then ruled that Morris' predecessors' use of the roadway was permissive, and that the permissive nature did not change until at least September, 2003, when Morris began using the roadway. (Doc. 77.) Because Morris' adverse use did not continue for the requisite five years, he did not establish a prescriptive easement.

Some two months after the lower court granted summary judgment to the Badleys, Morris filed a Motion to Reconsider. (Doc. 80.) The lower court denied the Motion to Reconsider (Doc. 86) and entered Judgment (Doc. 87). Morris appeals.

STATEMENT OF THE FACTS

Daniel and Elaine Badley bought real property west of Kalispell in 1992. In 1993, Edna Greene bought the neighboring tract. (Doc. 46.) A portion of the gravel road in question, hereafter called "the roadway," straddles the boundary line between the tracts. It already existed as the Badleys' driveway when they purchased their property, although it was not as wide or as long as it is today. (Badley affid., ¶ 2, Exh. E to Doc. 46.)

During litigation below, the lower court required these parties to provide a detailed survey of the roadway in dispute. (Doc. 66.) Morris did not attach the survey to his brief, so it is attached hereto as Exhibit A for the Court's

convenience. It gives a clear picture of the properties and the roadway in question, and the Badleys request that the Court refer to it, rather than to the out-of-scale diagram attached to Morris' brief as Exhibit 2.

For clarification, both the Badleys' property and Greene's property include two tracts; the major portion, as well as a narrow strip of land along their common boundary. Thus, the Badley property is comprised of Tracts 10F and 10FA on the survey. Greene's property is comprised of 10J and 10JA.[1]

As stated, the roadway is gravel, and is really a driveway in nature; it serves only the Badleys, the Morrises and, on occasion, one other family south of the Morrises. (Badley affid., ¶ 3, Exh. E to Doc. 46; E. Badley depo, pp. 31-32, 43-44, Doc. 54.) As shown in grey on the survey, exhibit A, the bulk of the roadway is either on Greene's property or Morris' property. In other words, it tends westerly as it progresses toward Morris' property, to the point where it is situated entirely on either Greene or Morris land well before it reaches the Morris house.

Greene does not use the roadway to access her property. (Greene depo., pp. 13, 31, Exh. N to Doc. 67.) However, in 1993, she decided to place a rental mobile home on the southeast corner of her land, on what is now Morris' property, Tract

[1] When those lots were created, in the late 1960s, the grantor created 10F and 10J, neighboring 30-foot strips along their eastern and western boundaries, respectively. Those strips were eventually merged with the larger tracts, 10JA and 10FA. The parties hereto agree that the Badleys own both 10F and 10FA, and Edna Greene owned 10J and 10JA.

10JAA. *Id.*, p. 15. When they saw that Greene was preparing her property for a rental, the Badleys contacted her and informed her that a portion of the roadway crossed their land, and formed their driveway off of Cobler Village Road. (Badley affid., ¶ 4, Exh. E to Doc. 46.) The Badleys informed Greene that she would need to expand the roadway westward, further onto her own property, so that her renters would be driving primarily on Greene's land, not theirs. They gave permission, however, for Greene's renters to drive on their portion of the roadway whenever necessary, such as on those occasions where several cars met on the road and needed room to pass. *Id.*, ¶¶ 4, 5.

Greene did not assert that she had an easement. *Id.*, ¶ 5. Instead, she widened the road westward and southward, to the rental site. (*Id.*, ¶ 5; Greene depo., pp. 23-26, Exh. N to Doc. 67.) Had Greene wished to create an easement, she would have acted in a "hostile" manner and asserted a right to drive on the existing roadway. She would have refused to incur the expense of widening the roadway to keep her renters primarily on her own property. Instead, she agreed to hire the Woodrings, who widened the roadway further onto Greene's property. *Id.*, pp. 23-26. Greene and the Badleys consulted back and forth about such things as placement of a culvert at the north end of the roadway, which is the low spot. (*Id.*; Badley affid., ¶¶ 4, 5, Exh. E to Doc. 46; E. Badley depo., pp 80-81, Doc. 54.) Greene eventually widened the entire road, then and added on a spur going to the

mobile home site, and paid for the improvements. (Greene depo., pp. 23-26, Exh. N to Doc. 67; E. Badley depo., p. 90, Doc. 54.) Acting in this cooperative manner is clearly permissive use, completely unlike the "hostile" use required to establish a prescriptive easement.

Greene's renters used the roadway for several years thereafter, staying mostly on Greene's property, but occasionally crossing onto the Badleys' property, as permitted. (*Id.* at pp. 64-65, 80, 88; Badley affid., ¶ 4, Exh. E to Doc. 46.) The bulk of the roadway is on Greene's property in any event, as shown on the survey, exhibit A.

In 1996, Greene surveyed out and created Tract 10JAA, where the rental was already situated. She conveyed 10JAA to her daughter Kelsey, who was then 13 years old. (Greene depo., pp. 16-17, Exh. N to Doc. 67.) Kelsey moved onto tract 10JAA when she turned 18. *Id.*, p. 17. She used the roadway as the renters had, and got along peacefully with the Badleys. Kelsey's affidavit confirms that she crossed over onto the Badleys' property "when necessary to avoid other vehicles, obstacles in the road, or potholes." (K. Morris affid., ¶ 4, Doc. 45; E. Badley depo., p. 56, Doc. 54.) This use comported with the Badleys' permission. Thus, they did not retract it.

In 2003, Kelsey married Appellant Clinton "John" Morris, and he began using the roadway. He used it in much the same way as Kelsey did. "[W]hen

necessary to avoid other vehicles, obstacles in the road or potholes, I have on occasion travelled to my residence on the Badleys' thirty-foot strip of land [referring to tract 10F]." (C. Morris affid., ¶ 3, Doc. 41.) However, neighbourly relations soured when Morris began to act discourteously. The Badleys became upset about the speed with which he drove on the roadway, as their grandchildren occasionally played near the road. (E. Badley depo., pp. 30, 75, 69, Doc. 54.) In addition, Morris would "cut the corner" as he turned off of Cobler Village Road, and the Badleys felt that he was pulling his trailer across the east end of the culvert, crushing it. (*Id.*, pp. 58-59, 68; Complaint, Doc. 1.) He would also plow the road and push the snow onto the Badleys' property. (Amended Complaint, ¶ 5, Doc. 33.)

The Badleys decided to build a fence, just their side of the boundary line. They knew that a fence (which would end at the cul-de-sac on the north end), would leave plenty of room for the Morrises and their guests to drive in and out of their property. (Badley affid., ¶ 3, Exh. E to Doc. 46; 2d Badley affid., ¶ 4, Exh. J to Doc. 67.) When they placed fence posts, however, Morris tore them out. He did the same to "no trespassing" signs. (Complaint, ¶ 5, Doc. 1; Badley affid., ¶¶ 5, 6, Exh. E to Doc. 46.) On January 9, 2007, the Badleys formally revoked their permission to cross over onto their side of the roadway. (Letter, Exh. G to Doc. 46.) Morris still would not allow them to build a fence, so the Badleys filed this

action on August 30, 2006, fewer than five years after Morris began using the roadway. (Complaint, Doc. 1.)

After the lower court ruled that Morris did not have an easement, the Badleys constructed their fence. (Doc. 82, p. 5.) It ends at the cul-de-sac, shown on exhibit A. (Doc. 67, p. 3.) The Morrises have continued to use their portion of the roadway (and Greene's portion) since that time, without any apparent difficulty, even when Morris is pulling a long trailer. (Doc. 82, p. 5.)

SUMMARY OF ARGUMENT

The party asserting a prescriptive easement has the burden of showing, by clear and convincing evidence, that his use was open, notorious, exclusive, adverse, continuous and uninterrupted for at least five years. In this case, the element of adversity is in contention. While Morris' use may have been adverse, it did not continue for the requisite five years. Moreover, efforts to "tack" his use onto that of his predecessors are unavailing; their use was permissive. As a matter of law, permissive use never ripens into an easement. Thus, the lower court correctly ruled that Morris did not establish an easement.

Edna Greene's use of the roadway was clearly permissive, as was that of her renters and her daughter. They used the roadway precisely as the Badleys allowed, and their use did not exceed the scope of permission.

The District Court correctly granted summary judgment in the Badleys' favor. Its ruling should stand. The Badleys respectfully requests that the lower court's order be affirmed.

ARGUMENT

As the lower court stated in its Order on Cross Motions for Summary Judgment: "The law does not favor prescriptive easements." (Order, p. 3, Doc. 77; *see also* 25 Am. Jur. 2d, *Easements and Licenses*, § 39 (2008).) To establish a prescriptive easement, the party asserting the easement must show, by clear and convincing evidence, that his use was open, notorious, exclusive, adverse, continuous and uninterrupted for at least five years. *Leffingwell Ranch v. Cieri*, 276 Mont. 421, 426, 916 P.2d 751, 754 (1996); *Leisz v. Avista Corp.*, 2007 MT 347, ¶ 16, 340 Mont. 294, 174 P.3d 481; Mont. Code Ann., § 70-19-411. If that party proves that his use was open, notorious, exclusive, continuous and uninterrupted, a presumption of adversity will arise. *Keebler v. Harding*, 247 Mont. 518, 521, 807 P.2d 1354, 1357 (1991); *Rathbun v. Robson*, 203 Mont. 319, 322, 661 P.2d 850, 852 (1983). However, the presumption may be rebutted by evidence that use was permissive. *Id.*; *Keebler*, at 521, 807 P.2d at 1357.

As a matter of law, permissive use never ripens into an easement – it can always be revoked. *Id.* at 521, 807 P.2d at 1356-57; *Rappold v. Durocher*, 257 Mont. 329, 332, 849 P.2d 1017, 1020 (1993).

Here, it is the element of adversity that is at issue. Moreover, the parties agree that Morris used the roadway for fewer than five years. Thus, he must "tack" his use onto that of his wife, Kelsey Morris, and/or his mother-in-law, Edna Greene, *and* show that the combined usage was adverse for at least five years, in order the prevail. The lower court correctly found that he did not meet that burden.

A. Edna Greene's use of the roadway was permissive; it did not ripen into a prescriptive easement.

1. Edna Greene's affidavit was not presented until after the lower court had ruled on summary judgment, and should not be considered here.

Morris argues that the lower court erred in finding for the Badleys, because "Greene presented evidence that contradicted Badleys' claim." (Morris br., p, 7.) Part of the evidence he asserts is found in Greene's affidavit. Crucial to this matter is the *timing* of Edna Greene's affidavit.

When Morris filed his motion for summary judgment below, and the Badleys filed their cross-motion, neither party had a signed affidavit from Edna Greene. (Morris br., p. 2.) The Badleys later attached her deposition transcript to a supplement to their brief. (Exh. N to Doc. 67.) The lower court had nothing more from Edna Greene before it when it ruled on the summary judgment motions.

More than two months after that ruling, Morris belatedly produced Greene's affidavit with his Motion to Reconsider, in an effort to create a question of fact. (Doc. 80, 81.) It was not a new piece of evidence from a witness who could not be

found during briefing; Greene is Morris' mother-in-law and lives very close to him. Certainly Morris could have produced her affidavit at any time.

The lower court had already ruled on the evidence before it, pursuant to Rule 56(c),(e),(f), M.R.Civ.P. The rule refers to the record available to the court, not the record as it evolves over the ensuing months. In addition, motions to reconsider are improper; Montana's rules of civil procedure do not authorize them. *Horton v. Horton*, 2007 MT 181, ¶ 7, 338 Mont. 236, 238, 165 P.3d 1076, 1077. Morris cannot now ask this Court to consider the affidavit, as he does. (Morris br., pp. 2, 11.)

2. Greene's use was permissive from the outset.

As stated in the factual summary, *supra*, the Badleys gave express permission to Edna Greene for her, and her renters, to cross onto their property when necessary, e.g. when two vehicles used the roadway and needed to pass. They never revoked that permission until January 9, 2007. (Letter, Exh. G to Doc. 46.) As shown on the attached survey, Greene's renters, and subsequently her daughter, would normally drive on Greene's property anyway; except for the northern end, the bulk of the roadway is situated on Greene's property.

The Badleys presented compelling evidence to the lower court to rebut any presumption that use of the roadway had been adverse. Their affidavit stated, in part, that:

- They contacted Edna Greene in approximately 1993, when she began to prepare what later became tract 10JAA for renters. They notified her that part of the roadway crossed their property, and that she would need to widen the roadway toward the west (further onto her own property) to accommodate her renters;
- They expressly gave her permission for her renters to occasionally cross over the boundary, when necessary;
- Edna Greene did not then claim that she had an easement. Instead, she complied with the Badleys' requests and worked with them to widen (and lengthen) the roadway, and to place a culvert at the north end;
- No problems arose with this consensual arrangement, including during Kelsey's premarital use, until Mr. Morris arrived on the scene, and they then revoked their permission.

(Badley affid., Exh. E to Doc. 46.)

In addition to the affidavit, the lower court had before it Elaine Badley's deposition transcript, in which she testified to agreements with Greene about widening and graveling the road, placement of the culvert, water drainage, etc. (E. Badley depo., pp. 64-65, 80, 90, Doc. 54.) In a subsequent, supplemental pleading, the Badleys also presented Edna Greene's deposition testimony. (Exh. N to Doc. 67.) Greene's testimony, in large part, was consistent with that of the Badleys:

Q. So did you and the Badleys then discuss how you were going to provide ingress and egress to your renters?

A. Pretty much. I had Elaine [Badley] visit with Woodring. I hired Woodring to extend the road.

. . . .

A. And I asked Woodring to consult with Elaine.

Q. Okay. So you had Woodring – did Woodring widen the road all the way down to the cul-de-sac on the north boundary?

A. Yes. Yes.

. . . . .

Q. So you and the Badleys, did you have discussions back and forth about how wide the make the road or where exactly to put it?

A. I think there was some correspondence. . . . .

Q. Okay. And was there a discussion, for example, as to whether to put in a culvert?

A. That came later.

. . . .

Q. And then did you and the Badleys eventually work out a workable solution as far as getting your renters in and out from Cobler Village [Road]?

A. I believe so.

Q. And who paid for Woodring's work?

A. I did.

(Greene depo., pp. 23-26, Exh. N to Doc. 67.)

This was all the information in front of the lower court as to events that occurred before Morris came on the scene in 2003, except for Kelsey Morris' affidavit. Kelsey's affidavit did not deny that the Badleys had given her mother permission to use the roadway, or claim that they revoked that permission for her use. It states, in part, that she used the roadway openly, nearly every day. "Additionally, when necessary to avoid other vehicles, obstacles in the road or potholes, I have on occasion travelled to my residence on the Badley's thirty foot strip of land [referring to tract 10F]." (K. Morris affid., ¶ 4, Doc. 40). Clinton John Morris' affidavit states the same thing – that he used the roadway openly (since 2003), and occasionally crossed onto the Badleys' property. (C. Morris affid., ¶ 4, Doc. 41). This is precisely the type of use the Badleys and Greene had agreed upon.

Morris cannot deny that the Badleys gave permission to Greene, because he was not privy to those conversations. (Morris depo., p. 39, Exh. C to Doc. 46.) Moreover, Morris admits that they cooperated in decisions about it:

> The road lays where it is today because of the direction of Elaine Badley instructing Woodrings [road builders], This is where the road shall be and this is where the culvert will be. The road is in its place today because of the instructions of Elaine Badley to Woodrings.

Id. at p. 40.

Thus, Morris did not present any evidence in summary judgment proceedings to effectively contradict the Badleys' evidence of a neighbourly,

permissive arrangement up until at least 2003. In fact, Morris' brief to this Court admits that Greene and the Badleys discussed how to widen and improve the roadway, and whom to hire to make the improvements, but asserts that they did not discuss any *particulars*. (Morris br., p. 4.) The fact is that discussions about how best to accommodate the renters' use are clear proof of a permissive, neighbourly arrangement. Had the Badleys insisted that the renters never cross over onto their property, or put up a fence, and had Greene nevertheless used it under claim of right, Morris might have proof that her use was hostile. As it is, his evidence did not raise any material, factual questions.

The lower court found as much:

> [The Badleys have presented undisputed evidence that use of the road began as a neighbourly accommodation or courtesy . . . No evidence has been presented to rebut the presumption that use of the Badleys' portion of the roadway continued to be permissive when the mobile home and its surrounding property were given to Kelsey Morris. The Montana Supreme Court has opined that "neighbourly accommodation is a form of permissive use which, by custom, does not require permission at every passing." *Heller v. Gremaux*, 2002 MT 199, ¶ 14, 311 Mont. 178, 53 P.3d 1259; *Tomlin Enters., Inc. v. Althoff*, 2004 MT 383, ¶ 18, 325 Mont. 99, 103 P.3d 1069. [The Badleys] were consequently not required to grant express permission to Kelsey for her use to continue to be of a permissive nature.

(Order, p. 4, Doc. 77.) In other words, this Court has previously found that courtesy should not be punished by ambushing a landowner with a prescriptive easement.

There is ample precedent for the lower court's decision. In *Keebler v. Harding*, 247 Mont. 518, 807 P.2d 1354 (1991), for example, Harding gained access to his property via a road that traversed Keebler's land. The road had existed since long before Harding purchased the property, and his predecessors had used it. *Id.* at 520, 807 P.2d at 1356. Shortly after Harding took ownership, a dispute arose between him and Keebler, and Harding cut chains off of gates on the road. Keebler filed suit, asking for a declaration that Harding did not have an easement because access across his land had been permissive until the dispute arose. *Id.* The lower court found in Keebler's favor. *Id.*

This Court affirmed, stating that Harding's first "distinct and positive assertion of a claim of right" did not occur until he cut the chains, fewer than five years before Keebler filed the action. *Id.* at 521, 807 P.2d at 1356. "Therefore, the existence of a prescriptive easement depends on whether the historical use of the road was adverse or permissive." *Id., citing Wilson v. Chestnut*, 164 Mont. 484, 525 P.2d 24 (1974). This Court held that permissive use does not morph into adverse use without some clear indication to the landowner; Harding's use was permissive unless exercised under a claim of right, "known to and acquiesced in by" Keebler. *Keebler*, at 521, 807 P.2d at 1357; *see also Warnack v. Coneen Family Trust*, 278 Mont. 80, 83, 923 P.2d 1087, 1089 (1996) (the claim must be

"known to and acquiesced in by the owner of the land"); *Taylor v. Petranek*, 173 Mont. 433, 437, 568 P.2d 120, 122 (1977).

As in the case at bar, Keebler presented evidence that use had historically been permissive. *Id.* People using the road had done so, as the lower court stated, "conditioned upon observation of the proper respect for the landowner's interests and uses. The Court finds that this use was pursuant to implied consent of the landowner." *Keebler*, at 522, 807 P.2d at 1357.

Just as in the case at bar, Harding's predecessor in interest had received permission to use the road. *Id.* This Court held that "evidence of a local custom of neighbourly accommodation or courtesy, without more, is sufficient to establish permissive use." *Id.* at 523, 807 P.2d at 1358; *see also Heller v. Gremaux*, 2002 MT 199, ¶ 14, 311 Mont. 178, 53 P.3d 1259 ("neighbourly accommodation is a form of permissive use which, by custom, does not require permission at every passing.")

Like Harding, Morris' burden required that he show some specific act whereby one of his predecessors changed the nature of the use, at least five years before this action was filed. In the *Heller* case, the District Court granted summary judgment to a landowner because the neighbors asserting a prescriptive easement presented "only mere allegation of prescriptive use and provided no specific factual matter contradicting [the landowner's] evidence of the permissive nature of

the road usage." *Id.* at ¶ 11, 311 Mont. at 183, 53 P.3d at 1263. This Court upheld the District Court's ruling. Similarly, while Morris now claims that Greene's and/or Kelsey's use was adverse, he cites no specific event that would have put the Badleys on notice of such. "The mere use of a way for the required statutory period is generally not sufficient to give rise to the presumption of a grant, and 'generally some circumstances or act, in addition to the use, tending to indicate that the use was not merely permissive, is required.'" *Id.* at ¶ 14, 311 Mont. at 184, 53 P.3d at 1264, *quoting Public Lands Access Assoc'n, Inc. v. Boone & Crockett*, 259 Mont. 279, 284, 856 P.2d 525, 528 (1993).

The Badleys and Greene, as well as Greene's renters and her daughter, had all used the road courteously and given each other freedom to pass as needed. They worked together to maintain the road and drain water from it. There was no "distinct and positive assertion of a claim of right" by any party, giving notice to the Badleys that the custom had changed, until at least 2003, when Morris began using the road in a manner that upset the Badleys and caused them decide to fence it to protect their interests. Morris did not meet his burden, and the lower court correctly granting summary judgment in the Badleys' favor.

B. Permission to Greene did not need to be expressly reiterated to Kelsey Morris, who continued on with the permissive use.

Because Morris did not start using the roadway until September, 2003, (C. Morris affid., ¶ 3, Doc. 41), he seeks to "tack" his use onto that of Edna Greene,

his mother-in-law, and/or that of Kelsey Greene Morris before their marriage. For this to be effective, he must first prove that their use went from permissive to adverse at some point before the marriage.

As stated above, he has the burden of showing some event that put the Badleys on notice of the user's claim of right. Morris admits that "'If the user began by the permission of the owner, it will not ripen into an adverse or hostile right until notice of such adverse use is brought home to the owner and the use continued thereafter for the statutory period.'" (Morris br., p. 12, *quoting Wilson v. Chestnut*, 164 Mont. 484, 490, 525 P.2d 24, 27 (1974).) This comports with established Montana law – an owner who has given permission may not be "surprised" into granting an easement; there must be some act that changes the permissive nature of the use.

An example of such a "hostile" act, putting the landowner on notice, is found in *Rude v. Marshall*, where the party asserting adverse ownership erected a ten-foot high fence around the property to which he claimed a right. *Rude v. Marshall*, 54 Mont. 27, 32, 166 P. 298, 299 (1917). Another example is found in *Slauson v. Marozzo Plumbing*, 2009 MT 333, ¶ 5, 353 Mont. 75, 77, 219 P.3d 509, 511, where the dominant owner built two fences and placed concrete posts on the servient estate, as well as driving on it. Conversely, in *Luoma v. Donohoe,* 179 Mont. 359, 588 P.2d 523 (1978), cooperative acts such as moving a gate at the

landowner's request, were found to be evidence of permissive use. *Id.* at 364, 588 P.2d at 526. In the case at bar, until at least 2003, when Kelsey married John Morris, no adverse acts, but only cooperative acts, occurred.

However, Morris argues that, even if the Badleys gave permission to Greene, Kelsey's use was necessarily adverse unless they also gave express permission to her. (Morris br., p. 14.) He urges that permission to Greene could not be passed on to Kelsey. He is incorrect. It is well established that the Badleys did *not* need to expressly give permission to Kelsey.

This Court has ruled on several occasions that permission may be either "express or implied." *See, e.g., Warnack v. Coneen Family Trust*, 278 Mont. 80, 83, 923 P.2d 1087 (1996); *Tanner v. Dream Island, Inc.*, 275 Mont. 414, 913 P.2d 641, 648 (1996). As early as 1932, this Court has held that a landowner need not specifically grant permission to the first user's successors. In *Groshean v. Dillmont Realty Co.*, 92 Mont. 227, 12 P.2d 273 (1932), the issue was whether the first user had permission to use the stairway in a joint wall between two buildings, or whether it was under claim of right from the outset. While the Court there found that use had always been prescriptive, (*id.* at 239, 12 P.2d at 275), the pertinent analysis confirms that permission need not be expressly reaffirmed with each new owner.

> The court universally recognize and apply the rule that, "where a right as to land by prescription is claimed, the period required for the

> prescription to mature does not begin to run until some fact exists giving the party against whom the prescriptive right is set up a cause of action. [Citation omitted.] **Where, as here, the use was permissive in its inception, the law presumes the use continued permissive until facts are shown disclosing a distinct and positive assertion of a right to the use, hostile to the owner and brought home to him.**

Groshean, at 229, (emphasis added), *quoting Omodt v. Chicago, M.&St.P. Ry. Co.*, 118 N.W. 798. The *Goshean* Court went on to state that "the burden of proving that the permissive use had ceased and that the use for the necessary period had been adverse under claim of right is on the party asserting its existence, and in case of doubt it will be resolved against him." *Goshean*, 92 Mont. at 230, *quoting* 9 R.C.L 781.

Morris asks this Court to instead be guided by *Han Farms, Inc. v. Molitor*, 2003 MT 153, 316 Mont. 249, 70 P.3d 1238. *Han Farms* is distinguishable, however. In that case, Han Farms and its predecessor had been driving over Molitor's property for some years. Molitor asserted that use was permissive. *Id.* at ¶ 14, 316 Mont. at 252, 70 P.3d at 1240. Unlike the Badleys, however, Molitor could not offer evidence of permissive use. She was not the party who gave permission – rather, she alleged that her predecessor did so. *Id.* The record does not reflect that Molitor's predecessor testified at all. *Han Farms* actually supports the Badleys' argument; this Court specifically noted the rule that "periodic, express grants of permission are **not** required to maintain the permissive character of the

use of a road. If a use begins as a permissive use it is **presumed** to continue as such." *Id.* at ¶ 16, 316 Mont. at 253, 70 P.3d at 1240 (emphasis added). The *Han Farms* held against Molitor only because "the record contain[ed] no evidence that Molitor *ever* gave Han Farms permission to use the road." *Id.* Here, as stated above, there was ample evidence that the Badleys had given permission to Greene, and no evidence that Kelsey's use differed from that of her predecessors. Thus, *Han Farms'* holding is very limited, and does not apply here.

C. Kelsey's use did not exceed the scope of permissive use.

As the lower court stated, "[Morris] has not produced evidence of any actions by Kelsey Morris that were a deviation from the use of the roadway permitted by [Badleys]." (Order, p. 5, Doc. 77.) However, in an attempt to create an event that changed the use from permissive to adverse, Morris urges this Court to find that Kelsey "far exceeded the scope of any alleged permission." (Morris br., pp. 7, 11, 12, 13.) Here, Morris indulges in hair splitting, asserting that Kelsey did not cross the boundary line just when *passing*, but may have done so on occasion even when *not passing*. (Morris br., p. 12-13, 21-22.)

Morris then, on at least four occasions, quotes a portion of Kelsey's affidavit (Morris br., pp. 13, 19, 21, 22), but does not finish the quote. He quotes her as saying that she used the roadway openly, "in broad daylight," but omits the portion

where she admits that she only occasionally crossed the boundary line, when needed to avoid an obstacle or pass another car. (K. Morris affid., ¶ 4, Doc. 45.)[2]

Morris is grasping at straws. As stated, most of the roadway is on Greene or Morris property. Kelsey clearly used it exactly as her mother's renters had used it, as the Badleys had allowed. She did not suddenly begin cutting the corner or speeding, or plowing as her husband later did.[3] This is precisely what the Badleys testified to as far as permissive use of their land; they instructed Greene to keep her renters on her own property to the extent possible, but gave permission to accommodate vehicles to use the road in a reasonable manner. Kelsey's use remained permissive, and did not ripen into an easement.

Use did not become adverse until at least 2003. Morris' use did not continue for five years, and did not create a prescriptive easement.

---

[2] A glance at exhibit A shows that she could not possible drive on the western 30 feet of the Badleys' property, except for on the very northern end of the roadway. She would be driving right through their lawn and garage and then through their pasture, which she clearly has never done before.

[3] While Morris' brief claims that the Badleys did not support their assertion that Kelsey used the road as permitted (Morris br., p. 13), the fact is that they cited to their affidavit, describing her use from personal observation. (E. Badley affid., Exh. E to Doc. 46.)

D. Morris' argument that evidence of the previous renters' use was required is without merit.

Finally, Morris asks this Court to speculate as to what the evidence *might* have shown, had he offered it below. He is referring to use by Greene's renters, who used the roadway before Kelsey moved onto tract 10JAA. (Morris br., pp. 16-17.) "It is reasonable, if not likely, that the evidence would prove that the renters travelled upon the Badleys' portion on a regular basis." (Morris br., p. 17.) Neither party located the previous tenants, or offered any evidence of their use. The District Court ruled on the evidence before it, for which Morris faults it. "The district court's ruling . . . did not address use by predecessors in interest or that of their renters." *Id.* The lower court did not speculate on evidence that does not exist nor can this Court be expected to do so.

CONCLUSION

Based on the foregoing authorities and points of law, the Badleys respectfully request that the Court affirm the District Court's Order granting partial summary judgment in their favor, and the Judgment entered below.

Respectfully submitted this 23rd day of June, 2010.

HASH, O'BRIEN, BIBY & MURRAY, PLLP
ATTORNEYS FOR PLAINTIFFS/RESPONDENTS

By: _____

Anne G. Biby
P.O. Box 1178
Kalispell, MT 59903-1178

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Plaintiffs/Appellees to be mailed to:

Sean S. Frampton
Brian M. Joos
Morrison & Frampton, PLLP
341 Central Avenue
Whitefish, MT 59937

Dated this 23rd day of June 2010.

Anne G. Biby

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Mac is not more than 10, 000 words, excluding certificate of service and certificate of compliance.

Anne G. Biby